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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL MUSANTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

_____

No.

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THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

MICHAEL MUSANTE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

Petitioner, the People of the State of California respectfully requests a writ of certiorari issue to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Two, which was entered on March 11, 1980, and became final on April 24, 1980. (Cal. Rules of Court, rule 24a.)

OPINION BELOW

The opinion of the Court of Appeal may be found at 102 Cal.App.3d 156, ___ Cal.Rptr. ___. A copy of the opinion appears as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeal of California became final on April 24, 1980. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether a thief of an automobile has an expectation of privacy in closed containers in the automobile so that police must obtain a search warrant to search closed containers within the automobile.

2. Whether the rule in Arkansas v. Sanders (1979) 442 U.S. 753, should be applied to the search in this case which occurred in 1977.

3. Whether the exclusionary rule should be modified or abolished as its deterrent effect is questionable and it does not foster public belief in the integrity of the judicial system.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

issue, but upon probable cause, supported by oath or affirmation, and particularly described the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. History of the Case

A complaint filed in the Municipal Court of San Bernardino County charged respondent Michael Musante with burglary (Pen. Code, § 459) in case F-1114. (CT 6.)1/ On January 27, 1978, an information was filed in CR 34522 charging respondent in count I with receiving stolen property (Pen. Code, § 496), in count II with possession of marijuana for sale (Health & Saf. Code, § 11359, subd. (a)), in count III with transportation of marijuana (Health & Saf. Code, § 11360), and in count IV with taking or driving the vehicle of another (Veh. Code, § 10851).

On February 6, 1978, respondent entered a guilty plea in the municipal court to the burglary charge in F-1114. (CT 11-18.) On March 31, 1978, respondent's motions to suppress evidence pursuant to Penal Code section 1538.5 and to dismiss the information pursuant to Penal Code section 995 were heard and denied in case CR 34522. (CT 23.)

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1. CT refers to the clerk's transcript of the proceedings in the superior court.

On April 7, 1978, respondent entered a guilty plea to the charge in count II of the information in case CR 34522. As part of the bargain the remaining counts in the information were to be dismissed. (CT 27-28.)

On May 22, 1978, a motion to withdraw the guilty plea to the burglary charge in F-1114 was heard and denied. (RT 5/22/78.)2/

On June 5, 1978, respondent was sentenced to state prison for three years on the burglary charge in case F-1114. He was also sentenced to state prison for 24 months as to the marijuana case. However, 16 months were to be stayed so respondent would only serve a consecutive term of 8 months as to that charge. (CT 47-51.)

He appealed from the judgments. (CT 52-53.)

In a published opinion issued on February 14, 1980, the California Court of Appeal, Fourth Appellate District, Division Two, reversed the conviction on the possession of marijuana for sale charge (CR 34522) on the ground the seizure of the marijuana was improper. (Appen. A.)

Petitioner, the People of the State of California sought a hearing

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2. RT refers to reporter's transcript of the proceedings in the superior court.

before the California Supreme Court, but the request for a hearing was denied on April 24, 1980. (Appen. B.)

The Court of Appeal and this Court have refused to stay enforcement of the judgment. (Appen. C.)

B. Statement of Facts

1. The Burglary Charge

Respondent's conviction on the burglary charge rested upon his guilty plea to the charge that he unlawfully entered a dwelling belonging to an Escol Moses in Lucerne Valley, California, with the intent to commit theft. (CT 6.)

2. The Possession of Marijuana for Sale Charge

On November 12, 1977, at about 1:25 a.m., Deputy Richard Crocker of the San Bernardino County Sheriff's Office, noted a car weaving slightly and moving to the shoulder. After observing the car weave, he followed it. Thereafter, the vehicle went through an intersection at a very slow speed and almost stopped at a green light. The car continued onto the freeway and continued to weave slightly. He then stopped the vehicle, spoke to the driver, checked her license, and administered a field sobriety test. However, he could not tell from her performance whether she was under the influence. Lacking the expertise to conclusively determine the issue, he called to the Highway Patrol for assistance.

(Preliminary Hg. Transcript, pp. 26-36.)

About 15 minutes later, Officers Stevens and Hernandez of the Highway Patrol arrived. Stevens contacted Musante, a passenger in the vehicle, while Hernandez administered a sobriety test to the driver. Stevens asked Musante whose car it was and Musante indicated it belonged to the driver and him as they were married. Musante then removed the registration from the car and showed it to the officer. When the officer noted the VIN number on the registration did not match the VIN number of the car, he ran a registration check. While he waited for a response, Hernandez told him the driver was not under the influence. During this time Musante and the driver gave conflicting stories with regard to ownership of the vehicle. The registration check eventually indicated the car had been stolen in Sonora, California, on October 25, 1977. Musante and the driver, a Miss Caston, were then arrested.

While the contents of the vehicle were being inventoried, an electric blanket box was found in the rear seat of the vehicle. The box was opened and marijuana was found inside. The box had been taped shut. (Preliminary Hg. Transcript, pp. 41-55, 72-74.)

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question regarding application of the exclusionary rule: whether an automobile thief may assert a legitimate right to privacy as to closed containers in the stolen car.

The State of California believes an analysis of the contrasting privacy expectations of the owner and the thief of an automobile indicate it is reasonable for the police to conduct a warrantless search of closed containers in a stolen vehicle. A thief should know the inevitable capture of the car will involve a search to determine ownership and an inspection of any containers in the car to determine their ownership.

This case is of nationwide importance as it involves the extent to which a thief may hide behind the shield of the exclusionary rule and use it as a sword to prevent proper police investigation. It also raises fundamental questions as to whether our legal system can recognize the right of a thief to assert a legitimate expectation of privacy in items contained inside a vehicle the thief has stolen.

ARGUMENT

I

THE WARRANTLESS SEARCH OF THE BOX WAS PROPER

Petitioner, the People of the State of California, respectfully requests this Court grant this petition

for writ of certiorari to consider the fundamental question of whether a thief who steals an automobile has any right to privacy with regard to items inside the automobile and whether the thief may assert Fourth Amendment rights with regard to the property in the stolen automobile.

Initially, it is well settled police may stop and search an automobile without a search warrant when they have probable cause to believe the vehicle contains contraband or evidence of a crime. (Arkansas v. Sanders, supra, 442 U.S. 753, 760; Chambers v. Maroney (1970) 399 U.S. 42; Carroll v. United States (1925) 267 U.S. 132.) The reason for this rule is that the inherent mobility of automobiles often makes it impractical to obtain a warrant. (Arkansas v. Sanders, supra, at p. 761; Chambers v. Maroney, supra; Carroll v. United States, supra.) In addition, the configuration, use, and regulation of automobiles often dilute the reasonable expectation of privacy that exists with respect to differently situated property. (Arkansas v. Sanders, supra; South Dakota v. Opperman (1976) 428 U.S. 364, 368; Cardwell v. Lewis (1974) 417 U.S. 583, 590.)

However, in Arkansas v. Sanders, supra, this Court concluded the rules allowing warrantless searches of automobiles did not apply to items inside an automobile to which there was an expectation of privacy such as personal luggage. Consequently, if such items were found inside a vehicle, they could be seized, but a search warrant would be required before the items could be searched. (Arkansas v. Sanders, supra, at pp. 763-766.)

This Court also noted, however, that not all items inside a vehicle were entitled to such an expectation of privacy. Rather, a case by case determination would be required to determine which items may only be searched with a warrant. The only specific holding in Arkansas v. Sanders, supra, was that luggage carried an expectation of privacy and could only be opened and searched with a warrant whether or not it was inside a vehicle.

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant. See Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before

> personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." (Arkansas v. Sanders, supra, at pp. 764-765, fn. 13.)

In the meantime, the California Supreme Court reached a similar conclusion. In People v. Minjares (1979) 24 Cal.3d 410, the California Supreme Court relied on the prior opinion of this Court in United States v. Chadwick (1977) 433 U.S. 1, and concluded once a closed container found in an automobile comes under the exclusive control of a police officer an immediate search was no longer necessary. Rather, a warrant had to be obtained for a search of the container unless exigent circumstances mandated an immediate search.3/

Based on this conclusion the court held a tote bag found in an automobile could not have been examined without a search warrant. The court also noted its holding was based on the federal constitution as it intimated "no views on how the validity of the search in this case would be decided under the California Constitution." (People v. Minjares, supra, at p. 424, fn. 8.)

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3. The Court denied a petition for writ of certiorari in the case. (California v. Minjares (1979) 443 U.S. 916.)

All these cases were employed by the California Supreme Court in People v. Dalton (1979) 24 Cal.3d 850. In Dalton, the California Supreme Court relied on Chadwick, Sanders and Minjares, and concluded a thief riding inside an automobile he had taken could assert a right to privacy as to closed items inside the automobile.4/ Accordingly, he could challenge and have a court invalidate a warrantless seizure of closed items inside the vehicle such as a box.

The essential facts in the instant case indicate officers stopped a car which was being operated in an erratic manner. Musante was the passenger and his wife was the driver. Prompt police investigation revealed the vehicle had been stolen and Musante was arrested. On the backseat the officers saw an electric blanket box. It had a top on it, but the top was not taped to the box. The box was opened and marijuana was located inside.

Under preexisting California law the search and seizure would have been proper as a thief could not procure the benefits of the Fourth Amendment and use them to shield him from a search of the box. (People v. Upton (1968) 257 Cal.App.2d 677, 682-684.) Nevertheless, because of the Dalton decision, the Court of Appeal was required to invalidate the search of the box in the car on the ground Musante, the man who had taken the

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4. A petition for writ of certiorari was denied in Dalton on March 24, 1980. ___ U.S. ___.

car, had a right to privacy as to the box inside the car. (See Auto Equity Sales, Inc. v. Superior Court (1962) 54 Cal.2d 450, 454-455 (decisions of the California Supreme Court are binding on all lower courts).)

Petitioner believes fundamental principals of constitutional law compel the conclusion a thief of a vehicle should not be able to assert a right to privacy as to closed items inside the vehicle the thief has taken. Accordingly, it is requested this petition for writ of certiorari be granted to reject such a result and to disapprove of any language in Dalton to the extent it intimates federal law grants a thief any legitimate expectation of privacy in closed items in a stolen vehicle.

The major problem with Dalton is that the California Supreme Court accepted the argument one who has stolen an automobile may assert a right to privacy in the items in the automobile. The rationale for his holding is that even if a thief has no expectation of privacy in the vehicle, he still would have an expectation of privacy in the closed items in the vehicle. The point being the issue is not the validity of the car search, but the validity of the search of the item in the vehicle. (People v. Dalton, supra, at pp. 858-859.)

However, the reasoning behind this conclusion is flawed because the interest of the thief in the vehicle cannot be separated from the interest of the thief in the items inside the vehicle.

It makes no sense to hold a thief has no right to privacy as to the stolen vehicle and then permit him to insulate evidence of a crime or instrumentalities of a crime from the police by placing them in closed items which were stolen along with the vehicle, or placed in the vehicle by the thief. A thief should have no legitimate expectation of privacy as to the vehicle or items inside the vehicle. Instead, a thief should know the inevitible capture of the car will entail a search to determine its ownership and an immediate inspection of any containers to determine ownership.

As Justice Gardner, of the California Court of Appeal observed in his concurring opinion below:

> "When someone is driving my stolen car, I think the police have a right to arrest him and to search him and all closed containers therein. I do not want that thief to have any of my Fourth Amendment rights. Of course, if the cops open a box and find my stash of marijuana, I have grounds to complain. But if they open the box and find the thief's stash he has no legal right to complain. He is not legally on the premises to be searched and has no standing to complain when the police open closed containers on those premises. But then, of course, Dalton says he has and that, to coin a phrase, is that.

> "None of this is meant to indicate that a burglar or a car thief loses his Fourth Amendment rights entirely. For example, he can only be patted down for weapons or destructive evidence. The skin search comes later -- during the booking process. It simply means he can't clothe himself in my Fourth Amendment rights -- which is exactly what the court did in Dalton although it denied doing it. I cannot see any logic in insisting on the issuance of a search warrant before the officers conduct an inventory of the contents of closed containers therein. I still think Upton was a good law." (People v. Musante (1980) 102 Cal.App.3d 156, 159-160.)

Support for our argument here may also be found in Rakas v. Illinois (1978) 439 U.S. 128. There passengers in a vehicle challenged a police search of a box in the glove compartment of the vehicle as well as seizure of a rifle. This Court rejected the notion the passengers could assert any Fourth Amendment claims as to the seizures noting the Fourth Amendment only protects those who can claim a legitimate expectation of privacy with regard to the invaded place. (Id., at pp. 141, 143-144, and fns. 9, 12.) Obviously, if the passengers of a vehicle had no legitimate Fourth Amendment rights with regard to the car, then Musante, who is a car

thief, is hardly in the position of being able to assert a legitimate expectation of privacy as to items in the victim's vehicle.

In addition, Musante cannot assert Rakas cannot be applied here as it is a rule of federal standing. Rakas defines what legitimate interests may constitutionally be protected by the Fourth Amendment, it is not a narrow decision concerning standing requirements. (Id., at p. 139.)

Moreover, Musante cannot claim Dalton and this case were only based on the California Constitution and are thus not affected by the Rakas decision. Dalton was based on the decisions of this Court in Sanders and Chadwick as well as Minjares, which, as noted earlier, was based on federal constitution. As Dalton purports to interpret rights granted under the federal Constitution, it is obviously subject to the limits of Fourth Amendment rights set forth in Rakas. (Oregon v. Hass (1975) 420 U.S. 714, 719.)

Moreover, Mincey v. Arizona (1978) 437 U.S. 385, does not assist respondent. In Mincey this Court held a defendant did not lose his Fourth Amendment rights in his own residence by having committed a murder there. The point of Mincey being commission of a crime does not deprive one of legitimate Fourth Amendment rights. However, unlike Mincey the defendants in Dalton and this case simply have no legitimate expectations of privacy to assert. They were

not the legitimate owners of the car involved or necessarily the contents of the vehicle.

United States v. Chadwick (1977) 433 U.S. 1, and Arkansas v. Sanders, supra, also do not compel a contrary result. These cases discuss the legitimate right to privacy of individuals in closed objects and indicate a warrant is required before such objects can be searched and seized. The crucial point here is that a thief of an automobile cannot assert any legitimate interest in the privacy of the articles contained therein.

Moreover, allowing a thief to assert a right to privacy in closed items in a stolen vehicle can only lead to public questioning of the reasonableness of our legal system. The exclusionary rule is designed to deter unlawful acts of law enforcement and to not make courts party to police illegalities. This is why illegally obtained evidence is suppressed despite the culpability of the accused. (Mapp v. Ohio (1961) 367 U.S. 643; People v. Cahan (1955) 44 Cal.2d 434.) In addition, the purpose of the exclusionary rule is the protection of an individual's legitimate right to privacy. Yet it seems questionable that the legal system should be in the business of granting a thief a right to privacy in items found in a stolen car. (People v. Solario (1977) 19 Cal.3d 760, Rakas v. Illinois, supra, at pp. 143-144, fn. 12.) While this fact may be lost on some, it is not lost on the public which, after all, the law is really designed to protect.

Moreover, it seems worth noting the exclusionary rule is not an end in itself. Rather, it is merely a means of protecting the rights of citizens from unreasonable invasions of their right to privacy in accord with the mandate of the United States Constitution. (Arkansas v. Sanders, supra, at p. 758.) However, a thief simply cannot assert police acted unreasonably by examining items in a stolen car. If he steals the car, he can hardly assert any rights as to the items in the stolen car. Moreover, if the items belong to the victim of the car thief, the victim can always assert his own right to privacy in the items. The thief of the car can hardly be permitted to steal the car and then claim the owner's rights to items in the car had been violated by police conduct.

It must also be noted that the idea of giving a thief a right to privacy as to items inside a car he has stolen seems contrary to the very basis of the Fourth Amendment which gives the people the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (Emphasis added.)

Furthermore, federal law indicates there is no right to privacy in a closed container such as a box. Both Chadwick and Sanders dealt with personal luggage to which an individual could have a reasonable expectation of privacy. There is no reason to assume, however, there is an expectation of privacy in an unsecured box lying in plain sight in the passenger area of a vehicle. (United

States v. Neumann (8th Cir. 1978) 585 F.2d 355, 360.) As was noted in Neumann, supra, at pages 360-361:

> "This court is of the opinion that the warrant requirement in Chadwick should not be extended to the facts of this case. There is simply an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile. The arresting officers merely lifted the lid of the box and discovered a large quantity of pills. Unlike the situation in Stevie, where the officers could have seized and inventoried the locked suitcase as a unit without fear of loss or theft of the contents, here it was reasonable for the officers to promptly examine the contents of the box and later to have the drugs properly inventoried and secured. This procedure protected the legitimate interests of the arresting officers, including protection against unwarranted allegations of theft or loss, and could well have protected the interests of the Neumanns in having their property properly identified, safely kept and returned had not the box contained a controlled substance."

Accordingly, having obtained cause to seize and search the vehicle, the officers had the perfect right to conduct a warrantless search of the cardboard box to determine its contents.

It must also be noted the rule enunciated in Arkansas v. Sanders, was not espoused until 1979. Yet, the search in this case occurred during 1977. Accordingly, the officers acted in good faith in accord with the law existing at the time. Under these circumstances there is no reason to apply the rule espoused in Arkansas v. Sanders retroactively. Such an application will not deter future illegal conduct as the police did not act illegally here. Rather, they acted in accord with the law as it existed at the time. Moreover, prospective application of the Sanders case will not place the courts in the position of condoning any conduct that was illegal at the time it occurred. Thus, the conduct of the police should be upheld here on the ground the Sanders case should only be applied prospectively. (United States v. Peltier (1975) 422 U.S. 531.)

Finally, it would seem this case presents an excellent example as to why the exclusionary rule should be reconsidered. First, recent studies have not been conclusive as to whether the exclusionary rule has deterred police from unlawful conduct. (See Oakes, Studying the Exclusionary Rule in Search and Seizure (1970) 37 U. Chi. L.Rev.; see Stone v. Powell (1976) 428 U.S. 465, 492-493.)

Moreover, the concept of deterrence assumes most police conduct is deliberate. However, this is not always the case. An incorrect judgment may be due to the pressure of making a split-second decision in the field, an inability to foresee changes in the law as in this case, or to foretell the composition and disposition of a particular court. (See California v. Minjares (1979) 443 U.S. 916.)

In addition, it is often said the exclusionary rule is needed to foster respect for the court system by showing the public the courts do not condone illegal activity by law enforcement. (See Stone v. Powell, supra, at pp. 489-491.)

Yet, it is difficult to see how the results of this case in the state courts would foster public respect for the court system. A thief took the car of another person and was then able to assert a right to privacy as to items in that car. The victim of the theft never asserted any right to privacy as to the car or the items inside or complained of police conduct. Yet, the thief was permitted to do so to have a court invalidate a search which was proper at the time it was conducted and have his conviction reversed. Such an Alice in Wonderland result hardly fosters respect for the legal system.

Accordingly, it is requested certiorari be granted to determine whether the exclusionary rule can be applied in the manner it has been applied or whether it should be abolished or modified.

Consequently, it is apparent the instant case raises fundamental questions as to the application of the exclusionary rule to this case and the validity of the rule itself. Because the issues presented in this case are of fundamental importance to all persons in the United States, it is requested this petition for writ of certiorari be granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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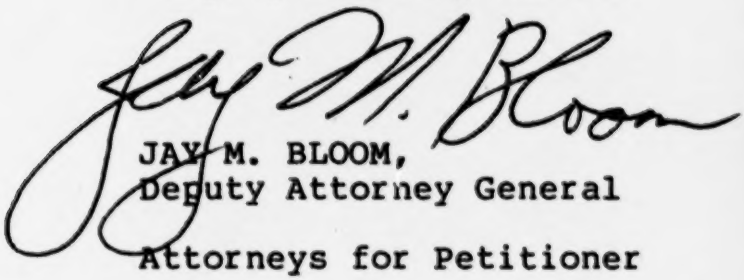

JAY M. BLOOM,
Deputy Attorney General

Attorneys for Petitioner

APPENDIX A

[Filed February 14, 1980]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(Sup.Ct.No. CR-34522/VCR-432)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant

APPEAL from the Superior Court of San Bernardino County. Donald R. Egan and Don A Turner, Judges. Affirmed in part; reversed in part.

Richard J. Weller, under appointment by the Court of Appeal, for Defendant and Appellant.

George Deukmejian, Attorney General, and Michael E. Lasater, Deputy Attorney General, for Plaintiff and Respondent.

Defendant pled guilty to burglary. Insofar as this court is concerned, he contends (1) that the trial court failed to advise him of the direct consequences of his guilty plea, and (2) that the degree of burglary was not specifically designated although he was sentenced for first degree burglary.

The lack of a certificate of probable cause precludes consideration of these contentions. We agree completely with the stand taken by the court in People v. Pinon, 96 Cal.App.3d 904 that if Penal Code § 1237.5 is to retain any viability in the statutory scheme, appellate courts cannot engage in a wholesale disregard of its procedural requirements. Judicial economy, the usual excuse for circumventing this section, is a sorry excuse for ignoring a statute which was enacted for that very consideration.

See insert on p A-1a

The judgment of conviction of burglary will be affirmed.

At the same time the defendant pled guilty to the burglary, he pled guilty to possession of marijuana for sale after an unsuccessful motion to suppress. We review the motion to suppress.

Stripped to their essentials the facts are really quite simple. Officers stopped a car which was being operated in an erratic manner. Defendant was the passenger; his wife the driver. Prompt investigation revealed that the car was stolen. Defendant and his wife

were arrested. On the back seat was a large box described as an electric blanket box. The box was opened and in it was a large amount of marijuana. It is the opening of this box which is the bone of contention.

At the time of this hearing, the issue seemed fairly clear. In People v. Upton, 257 Cal.App.2d 677, it was held that it was reasonable for officers to search a stolen car and in so doing to open suitcases or boxes found in that car for the purpose of ascertaining ownership or whether they contained any stolen material. (See Witkin, California Evidence 2d 1977, Supplement ¶ 120A.) Applying Upton to the facts of this case, when the officers found themselves in possession of a stolen car, it would appear reasonable for them to open the box which from its markings contained an electric blanket. It became necessary to ascertain either ownership of the blanket or whether it had been stolen.

Of course, Upton was decided before the current spate of footlocker/brief case/package/closed container cases. (United States v. Chadwick, 433 U.S. 1 [53 L.Ed.2d 538, 97 S.Ct. 2476]; Arkansas v. Sanders, ___ U.S. ___ [___ L.Ed.2d ___, 99 S.Ct. 2586]; People v. Minjares, 24 Cal.3d 410; People v. Dalton, 24 Cal.3d 850.) Upton might have had continued vitality under Chadwick, Sanders and Minjares. However, Dalton shot Upton down in flames. Under the circumstances almost identical to those in the instant case, the Supreme Court held that closed boxes or con-

tainers in a stolen vehicle cannot be opened without a search warrant. Under the compulsion of Dalton, we reverse the conviction of possession of marijuana for sale.

Affirmed in part; reversed in part.

CERTIFIED FOR PUBLICATION.

/s/ Gardner
P.J.

We concur:

/s/ Kaufman
J.

/s/ McDaniel
J.

Concurring opinion, Gardner, P.J.

People v. Dalton, 24 Cal.3d 850, which compelled a reversal in this case has a significant flaw. It is wrong.

I fully recognize that under the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below.

I have no quarrel with the principle that the Fourth Amendment protects closed personal effects as well as persons, houses and cars. After all, it is rather specific in protecting the rights of people to be secure in their "persons, houses, papers and effects." However, I think that if the authors of the Fourth Amendment were aware of Dalton, they would be turning over in their graves.

I do not accept the concept that a thief who steals my car thus wraps himself in the mantle of my Fourth Amendment rights. I do not quarrel with the concept that the Fourth Amendment protects people, not places. In our case, the lawful owner of the car would possess certain privacy rights concerning his vehicle and its contents which rights must receive the protection of the law. However, the owner possesses no person expectation of privacy as to contraband placed in his car by others after the

vehicle has been stolen. In order to apply the vicarious exclusionary rule to one in the defendant's position, it is first necessary to create a theoretical expectation of privacy in the vehicle owner as to the contraband of which he knows nothing and which found its way into his vehicle solely because the vehicle was stolen from him. I decline to accept the absurdity that the owner has any expectation of privacy in defendant's marijuana. I further contend that the thief had no expectation of privacy as to any package in the stolen vehicle.

Although Dalton denied that the vicarious exclusionary rule was applicable in this type of case, the court was in error. In Dalton, the court said at p. 859: "It is contended that appellant may not contest the search of the car under the vicarious exclusionary rule because no interest of the owner of the vehicle ws violated. (Citation.) Once again it should be pointed out that appellant is contesting the warrantless search of the boxes, not of the car. He never disclaimed any interest in the boxes. Thus, the search of the boxes does not involve the vicarious exclusionary rule. (Citations.)" This is pure sophistry. Conceptually, Dalton can't be upheld without resort to the vicarious exclusionary rule. And when that happens, the court comes slap dab up against Solario.

In People v. Solario, 19 Cal.3d 760, the court held that a burglar is not entitled to the protection of Penal Code

§ 844. It held that the vicarious exclusionary rule does not enure to the benefit of a burglar since the person whose rights were theoretically violated was the burglar's victim. The court made it clear that Penal Code § 844 offers protection to the householder, not to the burglar. As this court said in an earlier case, with perhaps a touch of hyperbole, a burglar cannot make another man's home his castle. (People v. Ortiz, 276 Cal.App.2d 1, 5.) Neither can a car thief make his victim's car his car for the purposes of the vicarious exclusionary rule. The concept was aptly put in the concurring opinion in People v. Shaw, 21 Cal.App.3d 710, 715, "To my mind it borders upon the absurd to hold that a thief should be given the benefit of a constitutional right to an expectation of privacy to a vehicle which he has stolen."

This is not to say that Fourth Amendment rights are available only to one who has clear title to property. That Amendment protects persons without title, e.g., one with a possessory interest or anyone legitimately on the premises or where the area is one to which there was a reasonable expectation of freedom from governmental intrusion. (Mancusi v. DeForte, 392 U.S. 364 [20 L.Ed.2d 1154, 88 S.Ct. 2120]; Jones v. United States, 362 U.S. 257 [4 L.Ed.2d 697, 80 S.Ct. 725]; United States v. Jeffers, 342 U.S. 48 [96 L.Ed. 59, 72 S.Ct. 93].)

The test for whether or not there has been an unreasonable governmen-

tal intrusion, of course, is whether the defendant had a reasonable expectation of privacy. (People v. Edwards, 71 Cal.2d 1096, 1100.) Aye, there is the rub. Unquestionably, a burglar has an overwhelming expectation of privacy. Actually, the entire criminal class, with the possible exception of flashers, operate entirely with a very real expectation of privacy. However, this is not a reasonable expectation which the courts will recognize or enforce. The criminal's right of privacy is always subject to reasonable governmental intrusion. Thus, to claim the protection of the Fourth Amendment, one must be legally and legitimately in the area about to be entered and searched. A simple example will suffice.

I was recently the victim of a burglary. A neighbor had seen the entry and, purely by accident, the police and I arrived at the same time and while the burglary was in full swing. The burglar, Billy Bell, a well known local professional, was apprehended under some bushes in the backyard. He was handcuffed and taken to the police car. The officers then returned to the bushes and in that area they found Billy's loot scattered around. But what if Billy had put his loot in a box, perhaps in a box with the label "Private property of Billy Bell, professional burglar. Keep out." Would the police have had to get a search warrant to open that box? To me the idea is downright silly. So, too, if a thief is caught in possession of a stolen car, why should he have any Fourth Amendment rights over closed containers in the car?

Perhaps thieves and burglars have different standards of protection. This, of course, presents some rather prickly equal protection problems. To me the idea of giving car thieves or burglars Fourth Amendment rights over closed containers in burgled houses or stolen cars is simply preposterous. Nevertheless, that is the result compelled by Dalton.

Dalton says that the officers were not certain that the defendant had stolen the car at the time the boxes were searched. Of course, they were not. Nevertheless, probable cause for an arrest existed. If we have to wait for convictions before officers can act, the efforts to police officers to protect the law-abiding public are going to be somewhat curtailed. When someone steals my car and I report it to the police, I think they have probable cause to arrest the driver and I don't think that a lack of a conviction has anything to do with the case. Actually, the odds are almost prohibitive that the driver is the thief. Of course, the insidious Dr. Fu Manchu might have stolen it, then, disguised as Honest John, used car salesman, sold it to the innocent driver. (To avoid a charge of racism, I will have Charley Chan arrest Dr. Fu Manchu.) But all of this has nothing to do with probable cause. When someone is driving my stolen car, I think the police have a right to arrest him and to search him and all closed containers therein. I do not want that thief to have any of my Fourth Amendment rights. Of course, if the cops open a box and find my stash of marijuana, I have grounds to complain. But if they

open the box and find the thief's stash he has no legal right to complain. He is not legally on the premises to be searched and has no standing to complain when the police open closed containers on those premises. But then, of course, Dalton says he has and that, to coin a phrase, is that.

None of this is meant to indicate that a burglar or a car thief loses his Fourth Amendment rights entirely. For example, he can only be patted down for weapons or destructive evidence. The skin search comes later -- during the booking process. It simply means that he can't clothe himself in my Fourth Amendment rights -- which is exactly what the court did in Dalton although it denied doing it. I cannot see any logic in insisting on the issuance of a search warrant before the officers conduct an inventory of the contents of closed containers therein. I still think Upton was good law.

When, in Cahan, the Supreme Court of this state adopted the exclusionary rule, it made a commitment that the courts would develop "workable rules" and not indulge in "needless refinements and distinctions" nor "introduce confusion into the laws of criminal procedure." (People v. Cahan, 44 Cal.2d 434, 3450.) That commitment was not only commendable, it was necessary. Police officers in the field making minute to minute and second to second decisions must have rules which are definite, simple, plain, explicit and understandable. Nevertheless, as I sur-

vey the 400 to 500 cases collected in Mr. Bell's splendid Compendium on Search and Seizure, I cannot but observe that the rules which have evolved constitute a kind of encrusted ritual of rigid etiquette which is almost Byzantine in its frozen formality and labyrinthine protocol. Dalton simply adds, erroneously I submit, to this ever thickening layer of legalisms and adds one more barren technicality to this already bloated and amorphous field.

I don't know how many car thieves are apprehended each year, but in each case any police officer worth his salt is going to conduct an inventory to ascertain the ownership and status of the contents of the car because car thieves are notoriously catholic in their thefts. In so doing, it will be necessary to open closed containers to ascertain ownership and whether they contain stolen goods. Under Dalton, they will have to secure a search warrant for this task. This simply imposes on the already heavy workload of prosecutors and judges a completely unnecessary burden because I can't for the life of me imagine any judge turning down such a request. So where has anyone benefited from this "needless refinement" to the exclusionary rule?

CERTIFIED FOR PUBLICATION.

/s/ Gardner
P.J.

[Filed March 11, 1980]

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(Sup.Ct.No. CR-34522/VCR-432)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant.

The opinion in the above case, filed February 14, 1980, is modified by the insertion of the following paragraph on page 2, following the first paragraph which concludes with the words ". . . was enacted for that very consideration."

The inserted paragraph is as follows:

"However, just to avoid an inevitable collateral attack on the basis of inadequacy of counsel for not securing a certificate of probable cause, we would observe that the defendant's contentions insofar as the burglary charge are without merit. This was a plea bargain. The defendant was advised of the direct consequences of his guilty plea and that advisement made it clear that he was pleading guilty to first degree burglary. The advisement was that he was to receive a 2, 3 or 4 year state prison term. That is the penalty attached to first degree burglary. Second degree burglary is punishable by either county jail or state prison (Penal Code § 461). The state prison term for second degree burglary is 16 months or 2 or 3 years (Penal Code § 18). Therefore, no question can arise as to the fact that defendant pled guilty to first degree burglary with the possible penalty specified. Thus, defendant's contentions if considered in spite of the failure to secure a certificate of probable cause would be held to be meritless."

With this modification, the petition for rehearing is denied.

/s/ Gardner
P.J.

I concur:

/s/ McDaniel
J.

[Filed March 12, 1980]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(Sup.Ct.No. CR-432 (VIC))

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant.

THE COURT:

Due to a clerical error, the Modification of Opinion on Denial of Rehearing, filed March 11, 1980, was stamped, 'Not To Be Published In Official Reports', and should have been stamped, 'Certified For Publication'.

Gardner, P.J.
Presiding Justice

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

I have this day filed Order

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Cal. 78 D 0526
NJ.
Francisco 4-24
Dom Fund
Date Rec'd
HEARING DENIED

In re: 4/cr. *No.* 10041
People

vs.

Musante

Respectfully,

G. E. BISHEL
Clerk

88888-877 11-76 4M OSP

APPENDIX C

[Filed May 19, 1980]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

4TH CRIM. NO. 10041
(County No. VCR 432)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL MUSANTE,

Defendant and Appellant

THE COURT:

The request by respondent, Attorney General, to recall and Stay Remittitur, is DENIED.

Gardner, P.J.
Presiding Justice

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
MICHAEL MUSANTE,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION TWO

RICHARD J. WELLER
Law Building, Suite 10
560 North Arrowhead Avenue
San Bernardino, CA 92401

Attorney for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
MICHAEL MUSANTE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Michael Musante, respectfully requests that the petition of the People of the State of California for issuance of a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, which was entered on March 11, 1980, and became final on April 24, 1980, be denied.

A. History of the Case

The following symbols are employed:

"CT" for clerk's transcript;

"RT" for normal reporter's transcript;

"RTF" for reporter Fletcher's transcript on motion to suppress.

A complaint filed in case F-1114 of the Municipal Court of San Bernardino County on January 10, 1978, charged respondent Michael Musante with burglary (Pen. Code #459) alleged to have been committed on January 2, 1978 (CT 82). An information in four counts filed in case number CR 34522 of the Superior Court

of San Bernardino County on January 27, 1978, charged respondent and Sindia Sue Musante in Count I with receiving stolen property on November 12, 1977 (Pen. Code #496), in Count II with possession of marijuana for sale (Health & Safety Code #11359, subd. (a)), in Count III with transportation of marijuana (Health & Safety Code #11360), and in Count IV with taking or driving a vehicle without consent of the owner (Veh. Code #10851) (CT 1-3).

On February 6, 1978, in the municipal court, respondent entered a plea of guilty to the burglary charge in F-1114, without specification of degree (CT 12-17). On March 31, 1978, his motions to suppress evidence pursuant to Penal Code Section #1358.5 (i) (providing for a de novo evidentiary hearing thereon in superior court), and to dismiss the information under Penal Code Section #995 were heard and denied in case CR 34522 (CT 23).

On April 7, 1978, pursuant to a plea bargain providing for dismissal of Counts I, III and IV, respondent entered a guilty plea to Count II of the information in case CR 34522 (CT 27-28).

On May 22, 1978, respondent's motion to withdraw his plea of guilty to the burglary charge in case F-1114 was heard and denied in municipal court (RT 1-27). On June 5, 1978, without hearing to determine the degree, he was sentenced in superior court to state prison for three years for burglary in the first degree (CT 47; RT 1-14). He was also sentenced to state prison for 24 months for possession of marijuana for sale in case CR 34522, 16 months of that sentence being stayed so that respondent would serve an 8 month term consecutive to that under F-1114 (CT 48-51; RT 17-24).

Respondent appealed from both judgments (CT 52-53).

In a published opinion issued on February 14, 1980, the Court of Appeal of the State of California, Fourth Appellate District, Division Two, reversed the conviction on the possession of marijuana for sale charge (CR 34522) on the ground that the

warrantless search of a closed cardboard container in an automobile in which appellant was riding on November 12, 1977, and seizure of its contents, was unlawful (Pet., Appen. A).

Petitioner, the People of the State of California, sought a hearing before the California Supreme Court, which was denied on April 24, 1980 (Pet., Appen. B).

The Court of Appeal and this Court have refused to stay enforcement of the judgment (Pet., Appen. C).

Upon remand, the information in case CR 34522 was dismissed in the superior court without prejudice on June 25, 1980 (Appen. A).

B. Statement of Facts

1. The Burglary Charge

Respondent's conviction on the burglary charge rested upon his guilty plea to the charge that he unlawfully entered a dwelling house belonging to an Escol Moses in Lucerne Valley, California, with intent to commit theft (CT 82).

2. The Possession of Marijuana for Sale Charge

On November 12, 1977, at about 1:25 A.M., Deputy Richard Crocker, of the San Bernardino County Sheriff's Office, noted a car approaching a bridge over the freeway to enter a one-way access on-ramp to the freeway, weaving slightly and moving to the shoulder. Thereafter, in going up a small hill approaching the bridge, it slowed almost to a stop, went slowly through a green light at the top and up the ramp onto the freeway. After observing the car weave slightly in its lane, he followed it about a mile and a half. He then stopped the vehicle, spoke to the driver, checked her license, and, though he detected no odor of alcohol, did not know what was causing the vehicle to weave somewhat, and administered a field sobriety test, which she performed all right in his opinion (RTF 24-33). Though he had considerable experience, as a booking officer at county jail, in

observing persons under the influence of alcohol, and had attended Advanced Officer's Academy, he had only been on patrol about a month and did not believe he had sufficient knowledge or background to determine if she was under the influence. Without any established policy for doing so, he detained the vehicle and its occupants, telling them they were not free to leave until Highway Patrol officers arrived (RTF 30-33).

When Officers Stevens and Hernandez arrived about 15 minutes later, Hernandez immediately contacted the driver, quickly determined that she was not under the influence and left her (RTF 43-44). 5-10 minutes thereafter, Stevens contacted respondent, the passenger, and asked for the registration. As he was contacting the dispatcher by radio, requesting him to run a check on the VIN number, Hernandez told him the driver was not under the influence (RTF 51), but the driver was told not to leave until the VIN information came back. A few minutes later the dispatcher called back (RTF 42-43, 50-51). Though no evidence thereon was received at the hearing on the motion to suppress (RTF 1-56), Officer Stevens had testified at an earlier preliminary hearing that the vehicle had reportedly been stolen in Sonora (Prelim. Hearing Transcript 43).

After respondent and the driver had been arrested and removed from the stopped vehicle (RTF 42-51), Hernandez entered and searched the vehicle and, observing in the rear seat a closed cardboard electric blanket box which had been taped shut, removed the front portion of the box, opened the lid and found marijuana inside (RTF 44-47). Respondent testified at the hearing on his motion to suppress that before he had set the box in the rear seat of the car he had sealed it all the way around with a complete strand of 3 inch grey duct tape, making the lid tight, so as to secure it and conceal its contents (RTF 52-53).

REASONS FOR DENYING THE WRIT

The contention advanced by petitioner that application of the exclusionary rule is not justified in this case in that the search did not invade any constitutionally recognized right of privacy of respondent as to closed containers in the automobile by reason of alleged forgeiture by him of any such right upon becoming an occupant of a vehicle which a hearsay dispatcher's report lists as stolen, has already been determined adversely to petitioner by this Court as well as the California Supreme Court.

Petitioner, the People of the State of California, in predicating its contention that it is reasonable for police to conduct a warrantless search of closed containers in what it terms "a stolen vehicle" upon such preliminary, hearsay information, would impermissibly convict respondent before the evidence against him was gathered and without right to be heard.

If this case is of nationwide importance, it is only for the purpose of reiterating the fundamental constitutional principle that the right of the State of California, or of any public officer or individual, to attach the appellation of "thief" to respondent or any other citizen must be determined in a lawfully constituted judicial forum in which he has the right to be heard, and, in the absence of a showing of exigent circumstances rendering it impracticable, the search of closed containers of his property, wherever found, must be upon the authorization of a warrant issued upon probable cause by a neutral and detached magistrate, and not upon the judgment of an officer in the field engaged in ferreting out crime.

ARGUMENT

I

THE WARRANTLESS SEARCH OF THE BOX WAS NOT PROPER

In requesting issuance of a writ of certiorari in this

case petitioner's argument is flawed throughout by predicating justification of a warrantless search upon the judgment of an officer in the field, based upon the hearsay report of his dispatcher that the vehicle was reported stolen, that each of its occupants was its thief, a premise which was rejected by this Court in Mincey v. Arizona, (1978) 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408, in that it would "impermissibly convict the suspect even before the evidence against him was gathered." Obviously, petitioner cannot fortify its contention upon the proposition also rejected by this Court in Michigan v. Tyler, (1978) 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486, that any subsequent conviction can be used ex post facto to validate the introduction of evidence used to secure it, for any such hypothesis was removed by the District Attorney, San Bernardino County, in dismissing Count IV of the information alleging the unlawful taking of the vehicle (CT 27-28).

While we acknowledge that, as contended by petitioner, police may stop and search an automobile without a search warrant when they have probable cause to believe it contains contraband or evidence of a crime, that rule is inapposite to the factual situation in this case, where the initial stop was not based upon any such belief. Assuming that a sufficient showing was made that the necessary specific and articulable facts had come to the attention of Deputy Crocker which, together with rational inferences from such facts, were such as to justify the initial stop of the vehicle and detention of its occupants for questioning or other limited investigation short of probable cause for a warrantless search (Terry v. Ohio, (1968) 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868; Wong Sun v. United States, (1963) 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407), which we question, and also assuming that in further detaining them to get the opinion of someone else because of his own lack of knowledge of facts

warranting a belief the driver was under the influence, the detention had not, by reason of its intolerable intensity and scope, exceeded the justification for the initial intrusion (Terry v. Ohio, supra, 392 U.S. 1, 17-18, 20 L.Ed.2d 210, 88 S. Ct. 1868, 1878), which is also open to question, petitioner's argument as to justification for a warrantless search of the automobile misses the point. As the California Supreme Court pointed out in the case of People v. Dalton, (1979) 24 Cal.3d 850, 157 Cal.Rptr. 497, cert. den. _____ U.S. _____, the suspicion that an automobile may be stolen goes to the issue of the validity of a warrantless search of the automobile itself, under an exception to the warrant requirement based upon its mobility. Respondent is herein contesting the search of the closed, sealed box, not the search of the automobile. Petitioner has never contended that the box was stolen and the officers never testified that they had cause to believe it was stolen or that it belonged to anyone other than respondent.

Following Arkansas v. Sanders, (1979) 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586, and United States v. Chadwick (1977) 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476, the California Supreme Court, in People v. Dalton, supra, 24 Cal.3d 850, where the detention and search of the automobile after a traffic-related stop was based, as it was here, upon a VIN report that it was stolen, held that, in the absence of a showing of exigent circumstances rendering it impracticable to obtain a warrant, the warrantless search of a metal box found in the trunk after officers had arrested the occupants was not justified and that the defendant's motion to suppress the narcotics evidence found therein should have been granted. Petitioner, in attempting to distinguish the factual situation in this case from that in Arkansas v. Sanders, supra, 442 U.S. 753, refers to language of this Court in that case indicating that there will be difficulties

in determining which parcels taken from an automobile require a warrant for their search and which do not, depending upon whether, from their outward appearance, any reasonable expectation of privacy can be inferred (Arkansas v. Sanders, supra, at pp 764-765, fn 13). While luggage was characterized both in that case and in United States v. Chadwick, supra, 433 U.S. 1, as a common repository for one's personal effects when one wishes to transport them and inevitably associated with the expectation of privacy, we do not understand the language of either case to limit their holdings to suitcases and footlockers, but to apply to any container indicating by its outward appearance a reasonable expectation of privacy. As indicated in United States v. Chadwick, supra, at 433 U.S. 1, 10, 53 L.Ed.2d 538, 547, the United States Constitution, Fourth Amendment's guarantee of the right of the people to be secure in their papers and effects against unreasonable searches and seizures extends to their papers and effects closed against inspection, wherever they may be (Citing Ex Parte Jackson, (1878) 96 U.S. 727, 733, 24 L.Ed. 877, 879). In People v. Minjares, (1979) 24 Cal.3d 410, 153 Cal.Rptr. 224 (Cert. Den. _____ U.S. _____), the warrantless search of a tote bag which was zipped up when, after arrest of the driver, it was removed by officers from the trunk of an automobile stopped upon suspicion of involvement in an armed robbery, was held by the California Supreme Court to have been unlawful and to require reversal of the driver's conviction.

While that court, in People v. Dalton, supra, 24 Cal.3d 850 (Cert. Den. _____ U.S. _____), held that an occupant could assert a right of privacy as to closed items inside an automobile in which he was riding, it did not indulge petitioner's liberally employed hypothesis that the officer could act under the presumption that he was a thief in determining the necessity for obtaining a warrant, but, as noted in the foregoing, observed that such

reasoning would impermissibly convict the suspect before the evidence against him was gathered, and that, in accordance with Mincey v. Arizona, supra, 437 U.S. 385, 391, 98 S.Ct. 2408, 2418, one who has placed personal effects in an automobile which may be suspected of having been stolen does not thereby waive his right to privacy in their contents.

When Officer Hernandez entered the vehicle in this case after the respondent, a passenger, and his wife, the driver, had both been placed under arrest and removed from it to the patrol car (RTF 42-51), and saw the cardboard electric blanket box in the rear seat, nothing in its outward appearance indicated that it was anything other than a repository for personal effects of someone using it for the purpose of transporting them. It was closed, the lid in place and taped securely all the way around by a complete strand of grey 3 inch duct tape to keep it tightly closed and its contents concealed from view (RTF 52-53), thus indicating that when placed there by respondent it was with an expectation of privacy.

Although, in view of the absence of any predicate establishing petitioner's liberally employed reference to the respondent as "the man who had taken the car", we do not deem it necessary to respond to petitioner's reference to People v. Upton, (1968) 257 Cal.App.2d 677, 682-684, as authority for the proposition that under California law preexisting Dalton the search and seizure in this case would have been proper in that, under Upton a "thief" could not procure the benefits of the Fourth Amendment to shield him from a search of the box, we make bold to say that the Court of Appeal was not limited to the constraint only of the Dalton decision in invalidating the search of the box in the car. Long before Dalton this Court interpreted the right guaranteed by the United States Constitution, Fourth Amendment, of freedom from unreasonable searches and seizures, as meaning

that any intrusion in the way of search and seizure is an evil which cannot be justified without a careful prior determination of necessity involving a neutral magistrate's scrutiny, conclusions concerning probable cause and scope of a search to be drawn by him, rather than by an officer in the field "engaged in the often competitive enterprise of ferreting out crime" (Coolidge v. New Hampshire, (1971) 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022; Johnson v. United States, (1948) 333 U.S. 10, 92 L.Ed.2d 435, 668 S.Ct. 367). Although exceptions to the warrant requirement have been established where the public interest, in exigent circumstances in the field, requires some flexibility in the application of that general rule, such as where (a) danger to the law officer, or (b) risk of loss or destruction of the evidence, outweighs the reasons for prior recourse to a neutral magistrate, the burden is upon those seeking the exemption to show the need for it (Chimel v. California, (1969) 395 U.S. 752, 762, 23 L.Ed. 2d 685, 89 S.Ct. 2034; Katz v. United States, (1967) 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507). Petitioner has not met its burden of showing that the search of the box came within any such exception. Nothing in the appearance of the box suggested, nor did the officers in any way infer, that any danger to them or risk of loss or destruction of the box or its contents would result from holding it with the automobile until a warrant to search it could be obtained.

Unless possessed of that charismatic "intuition" which inspired lynch mobs toward accomplishing their quest for "justice" in such dramatic, but tragic, tales as "The Oxbow Incident" or the proceedings of vigilantes in the old west, a police officer at the immediate scene has no way of knowing under what circumstances each occupant came to be in an automobile or what he did or did not bring with him. An assumption drawn in the field as to the guilt of each occupant serves no purpose in evaluating

the legal status of any citizen, or of his property (United States Constitution, Sixth Amendment; United States v. Di Re, (1948) 332 U.S. 58, 92 L.Ed. 210, 68 S.Ct. 222). As indicated in Mincey v. Arizona, supra, 437 U.S. 385, 391, the occupant may have a lessened right of privacy in his person after having been taken into custody, but such lessened right does not extend to his property which is not on his person. The exigency which justifies the stop of the automobile must be assessed at the point immediately before the search. Once the police had seized the box, the extent of its mobility was in no way affected by the place from which it was taken. Such closed cardboard box, taped to secure its contents from view, when taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with the same type of property taken from other locations, its purpose being to serve as a repository for personal effects its owner wished to transport (Arkansas v. Sanders, supra, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2568). If seized elsewhere after the arrest of the respondent, its search would have been subject to the same general rule under the warrant clause, requiring the issuance of a warrant (Chimel v. California, supra, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034).

With due consideration for the public policy interests involved in protection of the proprietary rights of the putative owner of the automobile, as advanced by petitioner, the United States Constitution, Fourth Amendment, protects people, not places, from unreasonable governmental intrusions into their legitimate expectation of privacy (United States v. Chadwick, supra, 433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476). Were we diverted from that concept to extend petitioner's rationale to its logical perameters, anyone who, in the judgment of a police officer on the scene, was found in a place where he was not

legally entitled to be (a trespasser upon private property, a tenant holding over after expiration of the term of his lease, a jaywalker crossing outside a crosswalk, a parade participant marching without permit, a sit-down striker, a motorist parked overtime, to suggest but a few examples) would be considered to have waived any right to object to seizure and search of any and all containers of his or her personal effects. While we do not presume to say that petitioner would contend for so extreme an application of its concept of waiver, it is logically implicit in its theory that the Fourth Amendment guarantee extends to places rather than persons. As for petitioner's contention that application of the exclusionary rule operates to provide a shield for the criminal, contrary to the public interest, that argument is best answered in the language of this Court in the case of McDonald v. United States, (1948) 335 U.S. 451, 455-456, 93 L.Ed. 153, 158, as follows:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate that the exigencies of the situation make that course imperative."

Citing Rakas v. Illinois, (1978) 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421, in which this Court held that passengers in a vehicle could not, under the circumstances in that case, assert any Fourth Amendment claims against search and seizure of a rifle and of a box of shells in the glove compartment, by

reason of their lack of any expectation of privacy, petitioner argues that Musante, who, says petitioner, "is a car thief", is hardly in the position of being able to expect a legitimate expectation of privacy as to items in the victim's vehicle. Without further comment upon petitioner's injudicious propensity for name-calling, we would invite attention to the considerably different factual circumstances in that case (Rakas v. Illinois, 439 U.S. 128), from those in this case, in that the occupants of the car in Rakas v. Illinois not only did not assert or claim any interest in the rifle and shells, but disavowed any. That is not the situation in this case, where Musante asserted ownership of the box and had taken precautions to protect his expectancy of privacy with regard to it.

Contrary to petitioner's argument, Musante can and does assert that Rakas v. Illinois, supra, 439 U.S. 128, though authoritative as to a rule of federal standing in a factual situation different from that in this case, is not applicable here for that reason. While we recognize that the Dalton decision interpets rights granted under the Federal Constitution and is subject to the limits of Fourth Amendment rights as set forth in decisions of this Court cited herein, its decision in Rakas v. Illinois, being factually distinguishable, is inapposite to this case. We further recognize, however, as pointed out by the California Supreme Court in People v. Brisendine, (1975) 13 Cal.3d 528, 119 Cal.Rptr. 315, that the California constitutional prohibition against unreasonable searches and seizures (California Constitution, Article 1, Section #13) is a document of independent force under which power is retained to impose higher standards on searches and seizures than are required under the Federal Constitution (Cooper v. California, (1967) 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788), and in its decision in the case of People v. Dalton, supra, 24 Cal.3d 850, was not necessarily limited by

federal decisions permitting lesser standards in any event. Since the basic principle of law upon which that case (People v. Dalton, supra, 24 Cal.3d 850) and the decisions of this Court in Arkansas v. Sanders, supra, 442 U.S. 753, and United States v. Chadwick, supra, 433 U.S. 1, are all based is that enunciated in the 1971 case of Coolidge v. New Hampshire, supra, 403 U.S. 433, and the 1948 case of Johnson v. United States, supra, 333 U.S. 10, requiring that a determination of probable cause for a search be made by a neutral and detached magistrate, rather than by an officer under stress in the field, we respectfully submit that consideration of any question of retroactivity of application is not involved here.

In summary, we submit that it is apparent from the record in this case, viewed from whatever aspect, that after the respondent and his wife had been placed under arrest and removed from the vehicle, any possibility of their exercise of control over the automobile or its contents ceased to exist, as did any possibility of danger to the officers or risk of loss of any evidence contained within it; that any proprietary interest of anyone else in the automobile or its contents would have been fully protected when it came under exclusive control of the Highway Patrol; and that no exigent circumstances rendered it impracticable to simply impound the vehicle and contents for the short time necessary to obtain a warrant for search of the box. As, from its nature and appearance, a reasonable expectation of privacy was manifested, the warrantless search of the box required the exclusion of any evidence of its contents (Mapp v. Ohio, (1961) 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684). Whether entered under the constraint imposed by the decision of the California Supreme Court in People v. Dalton, supra, 24 Cal.3d 850 (Cert. Den. _____ U.S. _____), or the constraint imposed by this Court under its decisions in the cases of Arkansas v. Sanders,

supra, 442 U.S. 753; United States v. Chadwick, 433 U.S. 1; Coolidge v. New Hampshire, supra, 403 U.S. 443; and Johnson v. United States, supra, 338 U.S. 10, the Court of Appeal of the State of California, Fourth Appellate District, Division Two, would be correct in rendering the same decision in the determination of the respondent's appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. WELLER, Attorney for Respondent, under appointment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
MICHAEL MUSANTE,
Respondent.

MOTION AND AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF ATTORNEY FOR INDIGENT RESPONDENT

RICHARD J. WELLER
Law Building, Suite 10
560 North Arrowhead Avenue
San Bernardino, CA 92401

Attorney for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
MICHAEL MUSANTE,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND APPOINTMENT OF ATTORNEY FOR INDIGENT RESPONDENT

Respondent, Michael Musante, respectfully moves the Court for leave to proceed herein in forma pauperis in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 53 of this Court, and to file his response to the petition for writ of certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, filed by petitioner, the State of California, without printing the same. The typed brief of respondent in opposition is presented herewith for filing.

Respondent further respectfully moves the Court to appoint Richard J. Weller, whose offices are at 560 North Arrowhead Avenue, San Bernardino, California 92401, telephone (714) 885-0086, a member of the bar of this Court admitted to practice herein on December 6, 1954, as his attorney in this action, under Title 28, United States Code, Section 1915(d) and Rule 53(7) of this Court. Although said attorney represented respondent in the state court under appointment by that court, respondent does not have counsel

representing him in this Court, nor is he able, by reason of the facts set forth in the affidavit filed herewith in support of the within motion, to employ counsel, and the appointment of the state court does not extend beyond its jurisdiction. Richard J. Weller is willing to represent respondent herein if so appointed and herewith consents thereto.

Dated: September 22, 1980.

RICHARD J. WELLER
560 N. Arrowhead Avenue, Suite 10
San Bernardino, California 92401
Telephone: (714) 885-0086
Counsel for respondent under appointment of Court of Appeal, State of California, Fourth Appellate District, Division Two

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

Michael Musante, being first duly sworn, on oath deposes and says:

1. He is the respondent in the above entitled action and makes this affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. Respondent is unemployed and is unable because of his poverty to pay fees and costs of this case or give security therefor.

3. This is a proceedings in which the petitioner requests that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, which was entered on March 11, 1980, in which are raised substantial questions of constitutional law, as more fully set forth in said petition and in the response of respondent submitted herewith for filing. Affiant is untrained

in the law, but is advised and believes that he has good and sufficient grounds, as set forth therein, for the denial by this Court of said petition. Respondent further respectfully requests that Richard J. Weller, whose offices are at 560 North Arrowhead Avenue, Suite 10, San Bernardino, California, telephone (714) 885-0086, a member of the bar of this Court, be appointed to represent affiant in opposing said petition. Although he represented affiant under appointment by the state court, in the matter of affiant's appeal, affiant does not have counsel representing him in this Court, nor is he able to employ counsel, and the appointment of the state court does not extend beyond its jurisdiction.

Michael L Musante
Michael Musante, Respondent

Subscribed and sworn to before me
this 22nd day of September, 1980,

Richard J Weller
Notary Public in and for said County and State.

OFFICIAL SEAL
RICHARD J. WELLER
NOTARY PUBLIC - CALIFORNIA
SAN BERNARDINO COUNTY
My comm. expires JUN 2, 1981

APPENDIX A

MINUTE ORDER

ACIS CASE NO: F-0002491
CASE NO: SCR-34522
FSS-22947
DEPT: 1

JUDGE: WILLIAM PITT HYDE
CLERK: JANICE NEWELL
BAILIFF: ANTHONY JAIME
REPORTER: S. KIRKPATRICK

DATE: 08/25/80 TIME: 08:30 AM
COUNSEL: P CASLAVKA DP
M. McDANIEL SSA
R. FRIEDMAN
J HOWARD DP

CASE TITLE: PEOPLE VS MUSANTE MICHAEL LEO DP
DEF 002

COPY NLO.

(PARTIES AND COUNSEL CHECKED IF PRESENT)

Thomas Gilcrest
ASST PROBATION OFFICER

NATURE OF PROCEEDINGS ( ) FILING OF: ( )(A) INFORMATION ( )(B) AMENDED INFORMATION ( )(C) AMENDMENT TO INFORMATION ( )(D) INDICTMENT ( )(E) AMENDED INDICTMENT ( )(F) AMENDMENT TO INDICTMENT.

4 ( ) CHARGE(S): _____

Trial Setting

1 ( )(A) Information ordered filed ( )(G) _____ ordered filed.

145 ( ) Motion by _____ to be relieved as counsel ( )(A) Granted ( )(B) Denied ( )(C) Submitted.
( ) After inquiry and advisal.

5 ( ) Public Defender appointed (_____ appearing).

6 ( ) Attorney _____ ( )(A) Retained ( )(B) Appointed ( )(C) Present ( )(D) Clerk to notify.

7 ( )(A) Defendant arraigned ( )(B) Formal Arraignment waived.

8 ( )(A) Information read ( )(B) Reading of Information waived ( )(C) Indictment read ( )(D) Reading of Indictment waived.

( ) The Defendant is informed of the elements of the charge(s). ( ) Factual basis established.
( ) The Court finds Boykin and Tahl Rules complied with.

11 ( )(A) Defendant pleads not guilty to _____.
( )(B) Defendant pleads not guilty by reason of insanity.
( )(C) Defendant pleads not guilty and not guilty by reason of insanity.
( )(D) Defendant pleads once in jeopardy to _____.

39 ( ) Defendant admits ( )(A) Prior(s) ( )(B) Armed allegation(s) ( )(C) Overt Act(s) ( )(D) Special allegation(s).

40 ( ) Defendant denies ( )(A) Prior(s) ( )(B) Armed allegation(s) ( )(C) Overt Act(s) ( )(D) Special Allegation(s).

38 ( ) Defendant stands mute to Prior(s)/Allegation(s)/Overt Act(s) (Court enters denial in his behalf).

18 ( ) Motions: ( )(A) 1538.5 P.C. ( )(B) 995 P.C. ( )(C) Reserved ( )(D) Set on _____ at _____ in Court _____ in Department _____. Points and Authorities due: Defendant _____ District Attorney _____.

13 ( ) Jury trial set for _____

212 ( ) Assignment Calendar set _____ at _____ in Court _____ in Department _____.

15 ( ) Defendant waives statutory time for ( )(A) Trial ( )(B) Sentencing.

222 ( ) Pre-trial Conference set _____ at _____ in Court _____ in Department _____.

27 ( ) Previous order forfeiting bail vacated ( )(A) Bail reinstated.

28 ( ) Defendant's motion for release on O.R. ( )(A) Granted ( )(B) Denied ( )(C) Submitted. 33 ( ) Defendant's motion for reduction of bail ( )(A) Granted ( )(B) Denied ( )(C) Submitted.

( ) Referred to Own Recognizance Officer/Probation Officer for report.

29 ( ) Bail set at $_____ ( )(A) Bail remains set at $_____.

30 ( )(E) Bail/Bond exonerated. 30 ( ) Defendant: ( )(A) Remanded ( )(B) Released ( )(C) On bail ( )(D) On Own Recognizance ( )(F) On Own Recognizance upon filing a signed agreement to appear.

2308 ( ) Defendant ordered to be present. ( ) Defendant granted _____ phone calls

144 ( ) Existing dates confirmed. at Defendant's expense.

VACAT ( ) Vacate _____

RESET ( ) _____.

127 ( ) Defendant remanded to Lower Court and ordered to appear on _____ at _____ in Court _____ in Department/Division _____ for further proceedings.

1540

9 ( ) Action continued to _____ at _____ in Court _____ in Department _____ for _____.

DATE: 1500 LH

32 (X) Matter Dismissed Without Prejudice.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1909

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

MICHAEL MUSANTE,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, Richard J. Weller, declare that I am an attorney at law licensed to practice in the State of California and a member of the bar of this Court admitted to practice herein on December 6, 1954, and having my office at 560 North Arrowhead Avenue, Suite 10, San Bernardino, California 92401.

1. On April 19, 1979, I was appointed by the Court of Appeal of the State of California, Fourth Appellate District, Division Two, to represent the respondent herein, Michael Musante, by reason of his status as an indigent defendant, in the matter of his appeal from the judgment of the Superior Court of the County of San Bernardino in cases number CR-432(Vic.) and CR-34522 of that court.

2. Since June 5, 1978, the respondent, a citizen of the United States, has been undergoing service of a sentence to inprisonment in the California State Prison for a term of three

years in case number CR-432(Vic.), not involved in the petition for writ of certiorari; that I am informed and believe upon the basis of the latest information available to me that at all times since June 5, 1978, respondent has been, and is now, an indigent person who, by reason of his poverty, is unable to pay fees and costs of this case or give security therefor;

3. This is a proceedings in which the petitioner, the People of the State of California, requests that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, which was entered on March 11, 1980, in which are raised substantial questions of constitutional law, as more fully set forth in said petition and in the response of respondent submitted herewith for filing. The respondent is untrained in the law, but in my opinion has good and sufficient grounds, as set forth therein, for the denial by this Court of said petition. Although I represented the respondent under appointment of the state court, in the matter of his appeal, that appointment does not extend beyond the jurisdiction of the state court, nor is the respondent able to retain counsel. I would be willing to accept, and hereby consent to appointment to represent respondent in this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 1980, at San Bernardino, California.

RICHARD J. WELLER, Declarant
560 N. Arrowhead Avenue, Suite 10
San Bernardino, CA 92401
Telephone: (714) 885-0086
SSN 517-07-7700